

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDY OAKS)	
Claimant)	
VS.)	
)	Docket Nos. 184,265 & 241,248
RAYTHEON AIRCRAFT CORPORATION)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent and the Kansas Workers Compensation Fund both appeal from an Award entered by Administrative Law Judge Jon L. Frobish on February 18, 2000. The Appeals Board heard oral argument July 14, 2000.

Appearances

Dale V. Slape of Wichita, Kansas, appeared on behalf of claimant. Terry J. Torline of Wichita, Kansas, appeared on behalf of respondent, a qualified self-insured. John C. Nodgaard of Wichita, Kansas, appeared on behalf of the Fund.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant filed an application for review and modification of a previous Award. Claimant also filed, in the alternative, a new Application for Hearing alleging a new accidental injury. The parties agreed to the previous Award on January 18, 1995. The previous Award was for 4 percent disability to claimant's left upper extremity resulting from injury in October and November of 1993. The Kansas Workers Compensation Fund agreed to pay 80 percent of that award.

After the agreed award for left upper extremity injury, claimant developed problems in her right upper extremity. The ALJ concluded the injury to the right upper extremity was a direct and natural consequence of the injury to the left upper extremity and modified the Award. He found claimant is now entitled to a work disability of 70.5 percent.

On appeal, respondent asks the Board to review the following issues:

1. What is the nature and extent of claimant's disability? Respondent contends claimant was terminated for cause unrelated to her injury and should be limited to disability based on functional impairment. The Kansas Workers Compensation Fund argues, in addition, that the injury to claimant's right upper extremity was not simultaneous with the injury to the left upper extremity and the modification of the Award should, for that reason, be limited to disability to the right upper extremity only.

Claimant argues the award of work disability should be affirmed. According to the claimant, the respondent failed to perform on its agreement to re-employ claimant after she completed treatment for the injury to the right upper extremity.

2. Has the ALJ given respondent credit for all temporary total disability and permanent partial disability benefits previously paid? Respondent contends it paid additional temporary total disability after the original agreed Award and the ALJ failed to account for these benefits in the current Award. In addition, according to respondent, the ALJ failed to credit respondent with the weeks of permanent partial disability benefits paid under the original Award.
3. Did the ALJ otherwise properly calculate the benefits paid under the modified award? According to respondent, the Award should credit respondent with all weeks that have elapsed since the original Award, including weeks of permanent partial disability and weeks that claimant remained employed at a comparable wage. Respondent argues that since a 70.5 percent disability calls for 250.68 weeks of permanent partial disability and since 246 weeks elapsed between the original injury and the effective date for modification of the award, claimant should, if work disability is awarded, be entitled to an additional 4.68 weeks of permanent partial disability benefits.

The Kansas Workers Compensation Fund asks for review of the following additional issue:

1. What is the date of accident for the injury to claimant's right upper extremity? The Fund contends the date of accident for the injury to claimant's right upper extremity is after July 1, 1994, and due to amendment of the statute, the Fund has no liability for injury after that date.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified. The Board concludes claimant has suffered a new injury to the right upper extremity. The Board finds the injury resulted in a 14 percent permanent partial disability to the right upper extremity.

Findings of Fact

1. Claimant originally injured her left hand, arm, and shoulder in October and November of 1993. Claimant received work restrictions and respondent provided accommodated work within those restrictions. In January of 1995, claimant settled her claim for these injuries pursuant to an agreed award for 4 percent of the left upper extremity. The agreed award required the Kansas Workers Compensation Fund to pay 80 percent of the benefits.

2. After agreeing to the award on the left upper extremity, claimant continued to work for respondent and developed problems in her right upper extremity. Claimant testified the injury to the right upper extremity occurred when she favored the injured left upper extremity. Claimant first reported problems with her right upper extremity in April of 1995. The record shows claimant was seeking treatment for both the left and right upper extremities at this time. In December of 1996, respondent referred claimant to Dr. George L. Lucas.

3. Dr. Lucas' records state that claimant began having pain on the dorsal aspect of her right wrist on October 18, 1996. Dr. Lucas initially provided conservative treatment for what he diagnosed as de Quervain's tenosynovitis of the right wrist. In October of 1998, Dr. Lucas performed a surgical release. Dr. Lucas rated the impairment as 5 percent of the right upper extremity. Claimant had complaints relating to the right shoulder and elbow, but Dr. Lucas did not include the shoulder or elbow in his impairment rating. Dr. Lucas did not recommend any restrictions.

4. Claimant continued to work for respondent until July 22, 1998, approximately five years after the original injury. Effective July 22, 1998, respondent terminated claimant for absenteeism due to an unrelated health problem.

5. Claimant worked for several employers after respondent terminated her in July of 1998. In August of 1999, respondent notified claimant they would be interested in rehiring her. Claimant was told to be at respondent's human resources department at a particular time to fill out the paper work necessary for rehiring. Due to a misunderstanding, claimant reported to the security office and waited there for the union representative. Because she

did not appear at the human resources offices on time, the respondent decided not to rehire her.

6. Claimant's injury was evaluated by Dr. Pedro A. Murati on April 28, 1999. He diagnosed right carpal tunnel syndrome; right hand pain, status post de Quervain release; right shoulder strain with impingement, crepitus, and loss of range of motion. He attributed the injuries to overuse while favoring the left upper extremity. He rated the impairment as 14 percent of the right upper extremity which converts to 8 percent of the whole person. Dr. Murati also combined the 8 percent whole person rating he gave based on the right upper extremity with the 5 percent whole person rating Dr. L. Blaty gave based on the left upper extremity for a 13 percent impairment of the whole person.

Dr. Murati recommended as permanent restrictions:

NO climbing ladders, crawling, heavy grasp (with the right), above shoulder work, work more than 18" from the body, use of hooks or knives, and no use of vibratory tools. OCCASIONAL driving, repetitive hand controls (with the right), repetitive grasping (with the right). Keyboarding 30 minutes off and 30 minutes on.

Dr. Murati also gave a task loss opinion. He testified claimant has a 70 percent task loss.

7. At the time of the regular hearing, claimant was working at Westview Manor earning \$6.25 per hour for an average of 35 hours per week.

8. The original award reflects respondent paid claimant, for the injury to the left upper extremity, 21.43 weeks of temporary total disability benefits, at the rate of \$313 per week, and 8.14 weeks of permanent partial disability benefits, also at \$313 per week, for a total award of \$9,255.41.

Respondent argues it paid an additional \$12,972.91, 41.45 weeks, in temporary total disability benefits as a result of the subsequent injury. Respondent refers, in support of this argument, to the stipulation filed November 4, 1999. But the stipulation filed November 4, 1999, does not support this argument.

The stipulation filed November 4, 1999, is captioned with docket numbers for both the original claim and the review and modification. The stipulation states that respondent has paid a total "indemnity" of \$12,972.91 and refers to the attached printout. From the attached printout, it appears respondent paid a total of \$9,255.41 in temporary total and permanent partial disability benefits for the initial claim, consistent with the agreed award, and has since paid 11 weeks of temporary total disability benefits at \$338 per week or \$3,718. The additional 11 weeks were paid, according to the printout, in 1996 and 1997. The \$338 was the maximum rate at that time. The total of \$3,718 paid in 1996 and 1997 and the \$9,255.41 paid in temporary total and permanent partial disability under the initial

agreed award combine to the \$12,972.91.¹ Contrary to respondent's argument it, therefore, appears that only 11 weeks of temporary total disability benefits were paid after the agreed award.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board finds that claimant has suffered a new accidental injury to the right upper extremity. The left upper extremity had been settled by an agreed award before claimant had complaints regarding the right upper extremity. The right upper extremity injury occurred because of, and after, the left upper extremity injury. The record does not indicate the two injuries occurred simultaneously. In April 1995, when claimant first complained of problems with the right upper extremity, claimant complained of problems in both upper extremities. But nothing in the record indicates claimant has additional impairment in her left upper extremity that had developed since the award on the left upper extremity.

The work claimant did for respondent after the injury to the left upper extremity caused injury to the right upper extremity. Had that work been for another employer, claimant would have been entitled to an award with benefits paid by the new employer. The injury here is no less a separate injury.

3. The Board finds that July 22, 1998, should be used as the date of accident for the new injury to the right upper extremity. This was the last day worked for respondent. *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

4. Amendments to the Kansas Workers Compensation Act effective July 1, 1993, eliminated liability of the Kansas Workers Compensation Fund for accidents after July 1, 1994. K.S.A. 44-567(a)(1). The Workers Compensation Fund therefore has no liability for injury to the right upper extremity.

5. Based on the testimony of Dr. Murati, the Board finds claimant has a 14 percent permanent impairment to the right upper extremity at the shoulder, or 225 week, level. The Board has adopted Dr. Murati's rating because it is the only one that includes the shoulder and elbow problems.

6. Respondent is entitled to credit for the 11 weeks of temporary total disability benefits paid after the initial award. K.S.A. 44-510d and K.A.R. 51-7-8.

¹ The Board is aware these numbers do not total exactly \$12,972.91 and the slight difference of fifty cents is not explained.

7. The decision that claimant's injury should be treated as a separate scheduled injury renders moot issues raised in this appeal concerning proper start date for a review and modification and proper calculation of the award for a whole body injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on February 18, 2000, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Judy Oaks, and against the respondent, Raytheon Aircraft Corporation, a qualified self-insured, for 11 weeks of temporary total disability compensation, previously paid at the rate of \$338 per week or \$3,718, followed by 29.96 weeks at the rate of \$366 per week or \$10,965.36, for a scheduled injury to the right upper extremity, making a total award of \$14,683.36, all of which is presently due and owing less amounts previously paid. This award is in addition to the amounts previously paid pursuant to the agreed award of January 1995.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita KS
Terry J. Torline, Wichita KS
John C. Nodgaard, Wichita KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director